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March 16, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, CC Docket No. 92-297, RM-7872, RM-7722

Dear Ms. Searcy:

On behalf of the RSW Communications, Ltd., enclosed please find an original and five (5) copies of Comments submitted in the above-referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,

Michael R. Gardner
David Jeppsen
Counsel for
RSW Communications, Ltd.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matters of	)	
	)	
Rulemaking to Amend Part 1	)	CC Docket No. 92-297
and Part 21 of the	)	
Commission's Rules to	)	
Redesignate the 27.5 - 29.5	)	PP-22
GHz Frequency Band and to	)	
Establish Rules and Policies	)	
for Local Multipoint	)	
Distribution Service;	)	
	)	
Suite 12 Group Petition	)	
for Pioneer's Preference;	)	

COMMENTS OF RSW COMMUNICATIONS, LTD.

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On behalf of
RSW COMMUNICATIONS, LTD.

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March 16, 1993

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COMMENTS OF RSW COMMUNICATIONS, LTD.

I. INTRODUCTION

These comments are filed by RSW Communications, LTD. ("RSW") in response to the Commission's Notice of Proposed Rule Making and Tentative Decision[1] ("NPRM") proposing the redesignation of the 28 GHz band from point-to-point microwave common carrier service to a local multipoint distribution service ("LMDS"). The NPRM was released in response to a Petition for Rulemaking filed by Suite 12 Group[2] ("Suite 12"), the inventor, patent holder and presently, sole operator, of the "millimeter wave component technology which can be used to offer video and other communications services in the [28 GHz] frequency range."[3]

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[1] Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, CC Docket No. 92-297, 8 FCC Rcd. 557 (released January 8, 1993.)

[2] Petition for Rulemaking filed by Suite 12 Group, RM 7872, Public Notice Report No. 21049, released December 16, 1991.

[3] NPRM at ¶ 2.

The Commission's proposed redesignation of the 28 GHz band is a bold and pro-competitive action clearly in the public interest. The proposal is justified by the technological advances made by Suite 12 to fully utilize formerly fallow spectrum to deliver video services as well as telephone and data services to the public. By advocating redesignation of the 28 GHz band, the Commission recognizes the benefits of Suite 12's technology and its broad commercial and non-commercial applications.

RSW is a group of diverse entrepreneurs, financiers and investors who have been actively monitoring the development of Suite 12's technology over the last several years. Several of our principals have seen the application of Suite 12's technology first-hand, and we are convinced that Suite 12's technology is innovative, functional and sound. We are excited about the potential applications of Suite 12's technology in both the commercial and non-commercial worlds, and we intend to apply for LMDS licenses in several markets so that we can be a part of the rapid development of LMDS throughout the United States.

By its action, the Commission is sending an unmistakable and important signal to entrepreneurs such as RSW, as well as inventors and proponents of novel technologies, that it will not only entertain, but support innovative technology, such as Suite 12's, that positively impacts public policy goals of delivering services and products to the consumer at competitive prices. Suite 12's technology immediately creates competition to cable companies and other providers of video services.[4] Suite 12's ability to deliver like-kind services at a noticeably higher quality and a substantially reduced cost without the infrastructure requirements and build-out problems commensurate with coaxial cable and fiber installations is consistent with the purpose, goals and resulting regulations mandated by Congress in the 1992 Cable Act.[5] Indeed, the Commission may be alleviating the need to regulate traditional cable

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[4] See NPRM at ¶ 16.

[5] Cable Television Consumer Protection and Competition Act of 1992, Publ. L. 102-385, 106 Stat. 1460 (1992) at § 2(b)(1) (the purpose of the Act is to "promote the availability to the public of a diversity of views and information throughout cable television and other video distribution media.")

operators if the intended competition results from the introduction of Suite 12's technology as a video and telecommunications alternative.[6]

Insofar as Suite 12's Petition for Rulemaking and the ability of its technology to deliver products as described in that Petition are consistent with and further enhances the public policy goals set forth by Congress, the Commission should:

* move to adopt a permanent redesignation of the 28 GHz band for LMDS use;

* set forth clear and manageable rules for the prompt selection of licensees and accelerated commercial availability of the system's services;

* adopt rules which remove the speculative, "quick-buck" aspect of previous lotteries, while creating and fostering the introduction of new and innovative contributors in the telecommunications field;

* adopt rules which promote realistic competition amongst various delivery and transport platforms;

* provide for non-commercial use of a portion of the allocated spectrum for the delivery of educational, health care and infrastructure applications of LMDS; and

* grant Suite 12 its request for a pioneer's preference for Los Angeles without requiring it to forfeit the substantial investment it has incurred to develop LMDS technology in the New York market.

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[6] The Commission is also serving an important economic goal in the proposed redesignation of the 28 GHz band. Most important, as the 28 GHz spectrum is dormant worldwide, the Commission is promoting American leadership in this new field, much like the American leadership in the development of HDTV technology. Furthermore, Suite 12's technology has a number of attributes and characteristics normally associated with military applications. Indeed, it is our understanding that a number of defense contractors have worked with Suite 12. Redesignation will provide non-defense work for defense contractors as defense work slows. Accordingly, the redesignation of the 28 GHz band will have important job creation ramifications.

II. USES OF SUITE 12'S TECHNOLOGY

LMDS Demand; (NPRM at ¶¶ 14-17).

As previously noted, several of our partners have witnessed the application of Suite 12's technology first-hand and have found it to be a pioneering breakthrough in over-the-air video services and telecommunications. As the Commission has correctly noted, Suite 12 has demonstrated that its patented technology and equipment have been operating successfully in Brighton Beach, Brooklyn, New York for some time.[7] We believe that Suite 12 has evidenced care and caution in building, developing and testing the Brighton Beach system.

Indeed, it appears that Suite 12 has demonstrated its responsibility and commitment to providing the best service at the most competitive price while providing the Commission with the prerequisites necessary to go forward with the proposed redesignation of the 28 GHz band. Moreover, we are impressed that Suite 12 continues to evaluate and upgrade the system's ability, scope and application.

The Commission is correct in concluding that the introduction of Suite 12's technology will enhance competition to the franchised cable companies as well as to providers of other telecommunication services. In this regard, the Commission may also be correct in predicting that video programming may become the largest use of spectrum, at this time. However, Suite 12 has demonstrated and strongly advocates, in its Petition and in other forums, that its system is more of a transport platform; to wit, the ability to deliver telephony and data applications as well as video applications within the same technology. Moreover, Suite 12 has recently demonstrated that its system can provide real-time video-conferencing services.

The ability to deliver such a range of multimedia services materially enhances the viability of Suite 12's technology as an alternative to costly fiber-optic-like services. Suite 12 also offers the prospect of delivering these services to the consumer on a mass basis before the end of this Century, while fiber-optic installations could run well into the first decade of the 21st Century at a cost many times that of Suite 12's technology. Indeed, one could

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[7] NRPM at ¶ 6.

argue that Suite 12's technology could prove to be a viable alternative to costly fiber optics.

The Commission recognizes the powerful transport characteristics of Suite 12's system by permitting the redesignation of the band for any video or telecommunications use.[8] Furthermore, the Commission should consider that the ability of Suite 12's technology to deliver multimedia services has implications beyond commercial competition and consumer service enhancement. As discussed below in more detail, the non-commercial applications of this technology in education, health care and infrastructure are significant enough for the Commission to consider allocating a portion of the spectrum for non-commercial use.

III. LMDS ALLOCATION

Wireless Cable Association Proposal (NPRM at ¶¶ 18-19).

The Wireless Cable Association ("WCA") has requested that the Commission insulate it against competition and further allocate a portion of the 28 GHz band for MMDS operators.[9] The Commission appropriately has tentatively determined that neither of these requests are necessary or consistent with its public policy goals and objectives. Indeed, the Commission correctly noted that MMDS operators have had a "de facto head start" over LMDS operators and "have had, and will continue to have, a significant opportunity to develop and refine their services and to establish market position."[10]

Furthermore, the Commission has also stated that the marketplace should determine the price, type, quantity and quality of 28 GHz services. The same should hold true as to the delivery platform selected by the consumer, whether it be LMDS, cable, MMDS, fiber optics or DBS. Contrary to WCA's request, it is not the role of the Commission to prefer one delivery system at the expense of its competitor. Yet, in effect, WCA has asked the

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[8] NPRM at ¶ 17.

[9] NPRM at ¶ 13.

[10] NPRM at ¶ 18.

Commission to protect traditional wireless operators from its LMDS competitor, the opposite goal sought by the Commission in this proceeding.[11]

The Commission's tentative decision to deny WCA's request for allocation of additional spectrum is also correct. Over the course of the last five years, the Commission has taken numerous significant actions to ensure the competitive position of wireless cable operators.[12] No further action is necessary or appropriate here. To the contrary, the Commission should ensure, in determining a spectrum allocation standard for 28 GHz, that it provide future LMDS operators with sufficient spectrum to spark true competition with existing service providers and provide LMDS operators with the adequate flexibility to deliver a wide range of services to the consumer public.

IV. NON-COMMERCIAL ALLOCATION

Structure of the 28 GHz Band (NPRM at ¶ 19, fn. 6).

We strongly urge that the Commission allocate of a portion of LMDS for non-commercial use. The Commission must balance two competing but equally important public policy goals. On one hand the allocation scheme must promote, foster and nurture a competitive environment in which future LMDS

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[11] It should also be noted that flooding the market with too much competition may in itself cause LMDS to fail, thereby defeating the entire purpose of the redesignation. This concern bolsters arguments in support of creating Band B for non-commercial use. See Section IV below for a more detailed discussion of this point.

[12] See e.g. Report and Order, CC Docket No. 86-179, 2 FCC Rcd 4251 (1987) (adopting rule changes permitting licensees to use MDS frequencies on either a common carrier or non-common carrier basis and holding program origination rules inapplicable to MDS operations.); Report and Order, MM Docket No. 89-35, 5 FCC Rcd. at 7639-41 (1990)(issuing ruling that wireless cable systems should not be subject to franchise requirements); Report and Order, Gen. Docket Nos. 90-54, 80-113, 5 FCC Rcd 6410 (1990) (adopting rule changes increasing the availability of MDS channels for use in wireless cable systems by eliminating MDS ownership restrictions and simplifying certain rules governing the application process); Second Report and Order, Gen. Docket No. 90-54, 6 FCC Rcd. 6792 (1991)(reallocating the three OFS H-channels to MDS); See also Order on Reconsideration, Gen. Docket Nos. 90-54, 80-113, 6 FCC Rcd 6764 (1991) and Report and Order, PR Docket No. 92-80, (FCC 93-31) (1993).

operators can provide competitive services to the public; the determination of a proper allocation scheme is critical to the future success of LMDS.

On the other hand, the Commission must consider the potential non-commercial applications of LMDS in education, health care and infrastructure. Suite 12's technology has important implications in the delivery of, and enhancement to, public access and cost of these services. In the current political environment in which the Clinton Administration seeks new and innovative solutions to old problems in education, health care and infrastructure, the Commission is challenged with finding the balance between these competing public policy goals.

As previously discussed, LMDS has the potential of delivering multimedia services mostly associated with a fiber-optic delivery platform (video, telephony and data) more rapidly and at a fraction of the cost. This is a compelling public policy consideration. LMDS will also provide competition to the cable industry, which should lead to improvements in the quality and cost of system alternatives to the consumer. Within a short period of time the consumer will have the choice of receiving video programming by cable, MMDS, SMATV, DBS, video dialtone or LMDS.

By redesignating the 28 GHz band for LMDS use, the Commission has finally provided the consumer with a viable alternative to cable. Moreover, with the advent of the technology's other applications in telephony and high speed data transmission, the Commission will provide new competition to the Regional Bell Operating Companies and data service vendors, a desired result of the spectrum's redesignation.

However, despite these valid goals, the Commission must not overlook the potential non-commercial applications of this technology that will clearly benefit the public interest. Indeed, the Commission should reserve a portion of the spectrum (a proposal for the amount of spectrum to be reserved will be discussed below) exclusively for non-commercial use. Interactive video education -- the ability to supply education directly to the home -- has long been an important goal of the Commission and educational institutions.[13]

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[13] See e.g. Educational Television, 39 FCC 846 (1963)(establishing the Instructional Television Fixed Service ("ITFS")); Instructional Television, 30 FCC 2d 197 (1971)(providing for the exclusive allocation of 28 channels to ITFS); Instructional TV Fixed Service, 94 FCC 2d 1203, 1224 (1983)("We

LMDS differs from historical attempts to deliver off-site education because of its interactive nature.[14] For the first time a student can ask a question and get an answer -- simulating the classroom to students and professors alike. The technology permits an off-campus student and teacher to conference, discuss issues as if on-site and build the type of relationships between students and their teachers that heretofore was confined only to those financially and logistically capable of being on campus for extended periods of time.

Additional educational applications include vocational training, continuing education, career retraining and other specialized educational applications. Further educational benefits include enhanced integration and awareness of a local campus or community college with the people and economy of their common neighborhood. LMDS will assist public universities to continue to meet increasingly difficult goals of providing affordable education to the public -- an important public policy consideration.

The Commission should also take into consideration other non-commercial applications of the technology such as uses of the system in health care. For example, through the use of Suite 12's technology, LMDS can deliver high-speed data transmission, high quality video signals and voice applications permitting the transfer of medical information, files, and high resolution images among and between hospitals and doctors throughout a

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continue to believe that the concept of a spectrum reservation for educational and other public service entities is valid"). Moreover, Congress has consistently stated that it is in the public interest to make public telecommunications services widely available, regardless of the technology or systems used. See, The Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 949 (Aug. 26, 1992)(enacting Section 396(a)(9) of the Communications Act).

[14] The interactive capability of Suite 12's system is far superior for educational purposes than the technology presently available in the ITFS frequencies. Indeed, the Commission has predicted that the educational applications of video communications will increase with the advent of new and efficient technologies, thus warranting the reserve of LMDS spectrum for non-commercial use. See, Instructional Fixed Television Service, 5 FCC Rcd 6410, 6411 (1990)("We continue to believe that [instructional programming] is a vital part of this country's educational landscape, and we anticipate that [instructional programming] will take on increasing importance as new technology is introduced . . . .")(emphasis added).

medical complex or larger geographic area. Experts in particular medical fields will be able to perform immediate medical evaluations without having to be on-site; home health care monitoring for post operative care or long-term illnesses become a reality with LMDS.[15]

In deciding whether to allocate a portion of the spectrum for non-commercial use the Commission is faced with a complex task of determining how to allocate spectrum among multiple non-commercial applicants. For example, while the University of Texas has taken an aggressive role in the Commission's redesignation process, it is not the only institution of higher education in the state of Texas that could benefit from Suite 12's technology. As discussed below in more detail, Band B should be made available to as many worthy applicants for non-commercial use as is practical.

In weighing the relative merits of allocating a portion of the spectrum for non-commercial use, the Commission must ensure, at all costs, that such allocation does not become a sham, ruse or vehicle for commercial uses of the spectrum. Any allocation of a portion of the spectrum for non-commercial use must remain genuinely non-commercial. Non-commercial applicants must not be allowed to lease or sell a portion of the spectrum to the commercial operator in their market.[16] This prohibition would ensure that the allocation of a portion of the spectrum for non-commercial use of the technology would remain dedicated for non-commercial use and would not fall within the domain of commercial operators. In fact, the risk of abuse in this regard is so high that should the Commission allow non-commercial licensees to lease their spectrum, we would support both bands being allocated for commercial use, rather than participate in a ruse or a sham.

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[15] Indeed, medical complexes such as the University of Texas' Southwestern Medical Center in Dallas, Texas and the University of Texas' Health Science Center in Houston, Texas are spread out over several miles of buildings in Dallas and Houston. There are other health science centers around the state. The ability of LMDS to bring these centers together, to pass video, data and voice real-time in an efficient manner has significant ramifications both to health-care and medical education.

[16] In this regard, we note that in the ITFS service allegations have been raised that the ability of ITFS licensees to lease excess capacity airtime for commercial use has been abused by several would-be profiteers. The potential for similar abuse by commercial entities leasing non-commercial LMDS spectrum is all to apparent.

At the same time, the Commission should consider that the cost and complexity of implementing an LMDS system may prohibit several non-commercial applications of the technology. Therefore, as a condition of granting a commercial license, the Commission should consider requiring the commercial licensee in a market to build and maintain the facilities of the non-commercial licensee(s) in that market. Indeed, by requiring the commercial licensee to build and maintain both the commercial and non-commercial systems, the complexity and technical confusion in coordinating multiple non-commercial licensees will be alleviated.

Finally, the Commission should make clear that the primary goal behind reserving Band B for non-commercial use is not to limit competition.[17] Quite the contrary, the Commission's desire to increase competition is the driving force behind this proceeding. Rather, the purpose of such an action is to facilitate the education and advancement of society through the most advanced technological means.

V. BAND A/BAND B ALLOCATION

The Commission proposes that the 28 GHz band initially be licensed in two blocks of 1000 MHz, each to different carriers, while proposing that the carriers be permitted to lease portions of such spectrum. The Commission has proposed that the 27.5 to 28.5 GHz spectrum be termed "Band A" and the 28.5 - 29.5 GHz band be termed "Band B".[18] As discussed above, the Commission should consider reserving Band B exclusively for non-commercial use.

The Commission also seeks comments on alternative assignment schemes such as breaking up the spectrum in four blocks as opposed to two.[19] However, an assignment scheme of this sort could severely frustrate an LMDS

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[17] The circumstances surrounding the introduction of LMDS are quite different than the circumstances surrounding the introduction of cellular telephony. LMDS operators will already face competition from a myriad of other sources. On the other hand, cellular operators faced almost no competition upon receiving a license. Thus, the considerations supporting the Commission's decision to allocate two commercial cellular telephone licenses per market are distinguishable from the situation here.

[18] NPRM at ¶ 20.

[19] NPRM at ¶ 21.

operator's ability to compete. In redesignating the 28 GHz band for LMDS, the Commission is trying to create and foster competition with existing cable operators and telecommunications service providers. In order to ensure that competition actually results from the proposed redesignation, the Commission must ensure that LMDS operators are in a position to take full advantage of Suite 12's technology by providing them with sufficient channel capacity to effectively compete. Without a doubt, a division of the available spectrum into four blocks would hamper the competitive ability of LMDS operators.[20]

In order to achieve these goals, the Commission should allocate 1,250 MHz of spectrum to Band A commercial operators and the balance, 750 MHz, to Band B non-commercial operators. This would not only provide the commercial operator with sufficient spectrum to compete, it would also ensure that the commercial operator has a special incentive to construct and maintain the non-commercial facilities on Band B. Indeed, an asymmetric assignment of this sort will efficiently allocate spectrum between commercial and non-commercial use, provide commercial and non-commercial operators with adequate spectrum to deliver their respective services and ensure that spectrum is not left dormant because of lack of use.

In the event the amount of spectrum in Band B is insufficient for the needs of the non-commercial licensee(s), the Commission may want to consider whether the commercial operator should be required, upon application and showing of need, to make available up to an additional 250 MHz of spectrum to non-commercial users. This would ensure that the assignment of spectrum for both commercial operations in Band A and non-commercial operation in Band B is fair, equitable and in the public interest.

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[20] Indeed, a primary reason why it has taken MMDS operators so long to become a competitive threat to cable systems is because MMDS operators have had difficulty in obtaining a sufficient amount of spectrum. See e.g., Report and Order, PR 92-80, (released Feb. 12, 1993, at para. 3 ("wireless operators have had difficulty amassing the number of channels necessary to meet subscriber demand.") The Commission should not similarly hamper LMDS operators with concerns over spectrum.

VI. TRAFFIC FLEXIBILITY & TECHNICAL ISSUES

The Commission appropriately proposes to allow maximum flexibility to licensees in determining specific bandwidth, emission characteristics, and other technical elements of a system.[21] Because of the platform nature of Suite 12's technology (i.e. the ability to deliver multimedia services), a licensee should be given flexibility to determine the nature and type of services offered within each designated market and, further, within each cell. By allowing such flexibility, the Commission will permit the marketplace to determine the specific types of services offered within a cell. This will allow an operator to customize services on a cell by cell basis to meet the particular needs, demands and economic characteristics of micro-communities.

VII. REGULATORY ISSUES

Preemption (NPRM at ¶ 28).

The Commission's tentative conclusion to preempt state regulation or control over LMDS licensees choosing non-common carrier status is correct. LMDS must be allowed to be deployed quickly and efficiently to provide the competition sought by the Commission. That goal will be frustrated if LMDS operators are subject to any state or local entry and rate regulations. Other state or local regulations that conflict with the Commission's stated goal of promoting competition should likewise be preempted.[22] The over-the-air nature of LMDS ensures minimal interference with municipal or city regulations or infrastructure and therefore there is no discernible reason for LMDS to be controlled by or otherwise regulated by any governmental body other than the Commission.

Service Areas (NPRM at ¶ 30).

The Commission has proposed the establishment of 487 "Basic Trading Areas" ("BTAs") plus Alaska and Puerto Rico for a total of 489 regional licenses encompassing all land areas within the United States. In suggesting this allocation scheme the Commission notes that the BTAs comprise areas

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[21] NPRM at ¶ 23.

[22] Florida Lime & Avacodo Growers v. Paul, 373 U.S. 132 (1963).

within which consumers have a community of interest as well as areas which will promote as much competition as possible to existing video and telecommunications services. The Commission is seeking to find areas of appropriate size to take advantage of economies of scale to support a successful enterprise.

The BTA appears to be the proper balance between a market area large enough to establish economies of scale and competitive financial characteristics and a market area not too large to be an impractical financial burden on the licensee. The build-out characteristics of Suite 12's system are substantially different than the build-out characteristics of cable or fiber optic systems. Because Suite 12's system does not have the infrastructure difficulties inherent in constructing cable and fiber optic systems, the only limitation to construction of a market area might be construction or equipment limitations. Establishment of Major Trading Areas as the applicable service area as opposed to BTAs may present a substantial, and in some cases, insurmountable burden to the license winner.

Conversely, the creation of smaller market areas, as was the case in granting cellular telephone licenses, could have the opposite effect. LMDS licensees will face substantial competition from cable, DBS, MMDS, and video-dialtone. Therefore, the market area must not be too small as to preclude economies of scale. Rather, the market area should be large enough to allow an LMDS operator to make a viable business with achievable and reasonable market penetration performance. Indeed, in hindsight the Commission has acknowledged that the cellular industry might have benefitted from larger initial service areas.[23] The choice of BTAs as market areas will also facilitate quick commercial development of LMDS, whereas the use of smaller areas would unnecessarily burden both the Commission, the lottery process and the financial community in building systems nationwide.

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[23] See In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rulemaking, 7 FCC Rcd. 5676, 5699-5701 (1992).

Service to Minimum Areas and/or Populations (NPRM at ¶ 32).

The Commission proposes to require LMDS licensees to provide service to 90 percent of the population within three years of granting of a license. This is a substantial, arbitrary and unreasonable burden to be placed on the LMDS licensee and far exceeds any previous requirements placed on cellular, MMDS or similar licensees.[24] An acceptable target level would be to require that 50 percent of the population within a market area receive service within the first five years after the grant of a license.

Once again, the Commission must strike a balance between expeditiously providing the public with LMDS service and new competition to existing service providers, and with providing LMDS licensees with the flexibility necessary to implement a new service and respond to changes in consumer demand, equipment costs and the availability of programming. In this regard, the Commission should follow its desire to allow the marketplace to determine the quality, quantity and cost of services with respect to LMDS and its future competition. An LMDS licensee should have no reason to delay taking advantage of this new technology, particularly since the Commission has proposed to prohibit licensees from transferring an LMDS license until the system has been constructed.[25]

If the Commission wants to ensure that the public benefits from LMDS technology and its resulting competition quickly, the Commission should accelerate the lottery/licensing process to provide for expeditious granting of licenses. This will have a far greater impact on providing service to the public quickly than imposing an unreasonable and impractical construction requirement on LMDS licensees.

Cross-Ownership Restrictions (NPRM at ¶ 33).

The Commission's tentative conclusion not to impose cross-ownership restrictions is sound. As the Commission has acknowledged, it is still uncertain whether video entertainment or telecommunications will be the

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[24] See generally, Part 21 of the Commission's Rules (no requirement that MMDS licensees cover a certain percentage of the market); and 47 CFR §22.903 (75% coverage requirement for cellular telephone licensees.)

[25] NPRM at ¶¶ 39-41.

predominant use of LMDS. Thus, there is no identifiable reason why the Commission should impose cross-ownership restrictions on LMDS at this time.

Nevertheless, the Commission should ensure that firms already having market power in the potential services to be provided by LMDS do not abuse the licensing process to limit competition. Thus, for example, should an existing service provider win an LMDS license in its existing market area, the Commission should impose a safeguard that prohibits that service provider from warehousing the spectrum or otherwise delaying in its development of an LMDS system for the purpose of avoiding competition.

VIII. FINANCIAL CONSIDERATIONS

Financial Qualifications (NPRM at ¶ 39-46).

Throughout the NPRM the Commission states that a compelling interest in proposing redesignation of the 28 GHz band is to create competition and to provide the public with new and innovative services.[26] Yet the Commission has proposed rules and financial requirements and conditions on granting licenses which do not match this stated objective.

The Commission's proposed ownership, alienation and hypothecation restrictions and financial requirements are exclusionary, inherently in opposition to the lottery process, and in opposition to the Commission's own stated public policy goals. As written, the rules will inhibit the ability of LMDS licensees to adequately finance the construction of an LMDS system.

As proposed, the rules are heavily weighted in favor of large corporations and financial entities and will perpetuate the concentration of deliverable services in the hands of a few. This will stifle creative applications of the technology, and entrepreneurial initiative, and will result in ill-advised and unnecessary barriers of entry into the telecommunications field. Indeed, the rules will deter up-start entrepreneurs, who may not be financially endowed, yet have the energy and ingenuity to efficiently and

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[26] For example, the Commission has stated: "[It is] our interest in making as many innovative, competitive services available to the public as quickly as

creatively implement an LMDS system.[27] Moreover, contrary to the Commission's long-standing goal to encourage minority ownership of media outlets,[28] the financial qualification rules, as proposed, will likely discourage minorities and disadvantaged groups from seeking LMDS licenses.

Furthermore, the proposed financial rules are inconsistent with common business practices and the current financial, lending and investment environment. The Commission should keep in mind that this technology, however exciting and innovative, will meet stiff market competition from a number of well established and entrenched service providers. By placing undue and onerous financial requirements on a licensee, the Commission is effectively saying that the only people that need apply are the existing cable companies and Regional Bell Operating Companies -- those parties with enough resources to meet an arbitrary financial means test. The Commission must balance its stated objectives with some level of financial sophistication. In doing so, it need not preclude an entire potential source of applicants from being involved in the technology.

To be sure, if the Commission wants to increase competition to existing service providers through the introduction of LMDS, it must encourage new entrants to the marketplace, not the same existing, and prosperous, entities against whom future LMDS operators must compete.

Moreover, the Commission must recognize the substantial difference between the financial characteristics of LMDS and other technologies such as cable or fiber optic. LMDS does not require substantial infrastructure expenditures or investment in plant and equipment. Once the initial headend is constructed and the first transmitter is installed, LMDS operators may

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[27] A good example of such a group is Suite 12, which is not a large corporation with infinite financial resources. In setting forth the strict requirements as the Commission has done here, it should ask whether it may be inherently precluding the advent of another Suite 12 in the future. Most surely, by these rules, it will stifle the creative and innovative application of this technology by entrepreneurs and other innovators.

[28] See, In the Matter of Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982); Metro Broadcasting, Inc. v. Federal Communications Commission, 111 L.Ed. 2d 445 (1990); In the Matter of Reexamintioan of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications, 3 FCC Rcd. 2377 (1987).

begin to supply service to the public. This will immediately result in cash flow to the operator which can be used to continue constructing the system on a cell by cell basis. Unlike traditional cable or fiber optics, the majority of capital expenditures to be made by an LMDS operator will be a variable cost: the cost of the receiver and set-top tuner in the subscriber's home. The fixed costs, beyond the initial headend, are the cost of the cell by cell transmitters.

As discussed below, the Commission should revise the proposed ownership restrictions and financial requirements which it set forth in the proposed rules[29] to more accurately represent both the financial reality and the unique business characteristics of LMDS, as follows.

First, the Commission's proposal to prohibit the transfer or assignment of any ownership interest in an applicant or licensee is unduly restrictive and otherwise inconsistent with Commission policy. Indeed, as written, the pro forma transfer exception to the proposed rule is hollow and meaningless, and would not even appear to allow an internal corporate reorganization, since an ownership interest invariably must be transferred in such a case. The Commission should revise its proposed rule to be consistent with existing policy, that is: a pro forma transfer or assignment is one that does not involve a substantial change in ownership or control.[30]

In this regard, the Commission should clarify that the alienation or hypothecation of equity interest up to 49 percent of the voting ownership of an applicant or licensee, provided there remains a single majority shareholder, will be allowed. The transfer of a non-controlling interest of

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[29] See NPRM at Appendix B (proposed rules §§ 21.1011 and 21.1008).

[30] See 47 CFR §73.3540(f)(1990). The Commission has set out examples of transactions not considered to involve substantial changes in ownership or control. These include an assignment of license from an individual to a corporation controlled by that individual, corporate reorganizations where ownership is not substantially changed, and an assignment or transfer of control from a parent to a subsidiary corporation, or vice versa. Id. Although the rule covers most situations, the transactions listed there are not intended to be exhaustive. See Storer Communications, Inc. 101 FCC 2d 434, 444 n.8 (1985). See also, 47 CFR § 1.962(b)(2)(1990), for a similar rule governing private radio services.

this sort is consistent with Commission policy,[31] and will provide an applicant and licensee with the flexibility necessary to effectively finance a system with the support of passive investors. Thus, an applicant should be allowed to finance its costs through the sale of equity, sale of subordinated debt with warrants, granting of stock options, profit sharing plans or other means of granting of ownership interests, provided, of course, that such transfer of interest does not result in a change of control of the applicant.

Second, the Commission's proposed requirement that applicants provide a business plan showing financial wherewithal to complete the entire construction of the system is unnecessarily rigid and inharmonious with the financial realities of LMDS. A more realistic approach would be to require that the applicant's business plan set forth initial costs and expenditures with month by month projected cash flow statements using prudent market penetration estimates for the first 24 months from the grant of the license. In this regard, the business plan should include detailed fixed overhead expenses for the first 12 months from the grant. The business plan should also evidence an ability on the part of the applicant to manage the system for that period without any revenue.

Moreover, the proposed requirement that an applicant demonstrate a firm financial commitment from a recognized bank or financial institution covering a three year period is burdensome and unwarranted. Again, a more realistic and achievable proposal would be to require a firm financial commitment in the amount equal to the construction of the first five (5) cells within a system as well as providing receivers and tuners for subscribers up to 5 percent of a cell's potential household market.

The above suggestions would encompass the prudent financial commitment of covering overhead costs for a 24 month period and a level of fixed and variable costs which would provide the licensee with the ability to generate the sufficient cash-flow necessary to fully develop a system and to

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[31] See In the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licensees, 97 FCC 2d 997, 1008 (1984)("In those instances where a corporate licensee, whether closely or widely-held, has a single majority voting stockholder, it appears neither necessary nor appropriate to attribute an interest to any other stockholder in the corporation.") See also, 47 CFR §73.3555(f), note (b) (1990).

alleviate any concerns the Commission may have with respect to the financial viability of a licensee.

IX. PIONEER'S PREFERENCE

We disagree with the Commission's tentative decision to condition the grant of Suite 12's request for a pioneer's preference for the Los Angeles market upon Suite 12's relinquishment of its license for New York. The purpose of the pioneer's preference rules is to provide an incentive for innovative entities, such as Suite 12, that undertake the substantial time and financial commitment to develop new and efficient uses of the spectrum that will serve the public interest.[32] The Commission has unanimously determined that Suite 12 is the precise type of innovator that the pioneer's preference rules were intended to foster.[33]

The Commission's decision to authorize Suite 12 to construct a system in New York was not intended to be a pioneer's preference, nor can the pioneer's preference rules be applied retroactively to make it such. Suite 12 was granted a waiver of the Commission's rules.[34] The purpose of that waiver was to allow Suite 12 to fully develop the commercial applications of its system. In other words, without the New York license, LMDS technology would have never reached its present state, such as to allow the Commission to redesignate the 28 GHz band. Suite 12 undertook an enormous risk in constructing the New York system for the purpose of fully developing and enhancing LMDS technology. In effect, the Commission now seeks to change the waiver for New York into a pioneer's preference for Suite 12. This tentative decision by the Commission to change the effect of an order mid-stream creates regulatory uncertainty which, contrary to the purpose of the pioneer's preference rules, will serve to dissuade new innovative groups such as Suite 12, and ultimately disserve the public interest.

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[32] 47 CFR §§1.402, 1.403, and 5.207; See also, Establishment of Procedures to Provide a Preference, 6 FCC Rcd. 3488 (1991).

[33] NPRM at ¶ 63.

[34] See, Hye Crest Management, Inc., 6 FCC Rcd. 332 (1991).

In short, it is inappropriate and inconsistent with the purpose of the pioneer's preference rules for the Commission to penalize Suite 12 for its significant efforts by requiring it to abandon its New York system in order to receive a pioneer's preference. Therefore, Suite 12's request for a pioneer's preference should be granted without condition.

X. CONCLUSION

RSW respectfully requests that the Commission adopt its proposed rules to redesignate the 28 GHZ band for LMDS use, subject to our comments herein.

Respectfully submitted,

By: _____

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